

**FILED**

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CLERK U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

Fernando Gastelum,

Plaintiff,

vs.

Bed Bath & Beyond, Inc.  
Defendant.

Case No.: 1:22-cv-1173 ADA-BAK

**VERIFIED COMPLAINT**

**PARTIES**

1. Plaintiff is a senior citizen man with physical disabilities. Plaintiff is missing a leg. Plaintiff uses a wheelchair for mobility and has a specially equipped sport utility vehicle.
2. The missing right leg substantially limits my major life activities of walking, reaching, pushing and other musculoskeletal activities that are normally associated with missing lower limbs..
3. Since 2015, Plaintiff has been using a wheelchair for mobility in locations that are designed for wheelchair use, that is, accessible routes that provide firm, level surface and that are wide enough to navigate his wheelchair.
4. Where the locations are not designed for the use of a wheelchair, that is, accessible routes do not provide firm, level surface, or are not designed for persons using a wheelchair, Plaintiff must use his prosthetic leg and a cane to move short distances.
5. Plaintiff prefers to use a wheelchair because walking on the prosthesis is painful, uncomfortable, and causes the prosthesis to rub against his skin. When Plaintiff uses

1 the prosthetic, his leg sweats which in turn loosens the prosthetic sleeve that begins to  
2 slip back and forth. Plaintiff can no longer walk then. This requires Plaintiff to stop,  
3 remove the prosthetic leg, let the sleeve dry up, and then put the prosthetic leg back  
4 on again.

5 6. Even with the use of the prosthesis and a cane, Plaintiff's ability to walk, push, reach  
6 and otherwise engage in activities requiring two handed or two legged operations are  
7 severely restricted.

8 7. Since 2015, Plaintiff has been using a wheelchair for mobility in locations that are  
9 designed for wheelchair use.

10 8. Defendant owns or operates Stores under the name Bed Bath & Beyond ("BBB"),  
11 including the following:

12 a. Bed Bath & Beyond at 2725 Marconi Ave., Sacramento, California 95821 ("BBB  
13 Sacramento"); and

14 b. Bed Bath & Beyond at 5000 Stockdale Hwy., Bakersfield, CA 93009 ("BBB  
15 Bakersfield"); and

16 c. Bed Bath & Beyond at 1642 W. 2<sup>nd</sup> Street Marketplace, Beaumont, CA 92223  
17 ("BBB Beaumont").

18 9. The Stores is open to the public and they are place of public accommodation

### 19 JURIDICITION AND VENUE

20 10. The Court has subject matter jurisdiction over the action pursuant to 28 U.S.C. §  
21 1331 and § 1343(a)(3) & (a)(4) for violations of the Americans with Disabilities Act  
22 of 1990, 42 U.S.C. § 12101, et seq.

23 11. Pursuant to supplemental jurisdiction, an attendant and related cause of action,  
24 arising from the same nucleus of operative facts and arising out of the same  
25 transactions, is also brought under California's Unruh Civil Rights Act, which act  
26 expressly incorporates the Americans with Disabilities Act.

27 12. Plaintiff specifically alleges that 28 U.S.C. §1367(c)(4) does not apply to the Unruh  
28 supplemental claim because:

a. Cal. Civ. Code §425.55 provide for lesser and unequal protections to disabled  
individuals than Part 36 of the Code of Federal Regulation. The application of

1 lesser and unequal protections under §425.55 are expressly pre-empted by 28  
2 C.F.R.103(c).

3 b. California's procedures in Cal. Civ. Code §425.55 providing for lesser and  
4 unequal procedural protections to disabled individuals were designed to regulate  
5 attorneys and not pro-se litigants.

6 13. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and is founded on the  
7 fact that the real property which is the subject of this action is located in this district  
8 and that Plaintiff's cause of action arose in this district.

9 **FACTUAL ALLEGATIONS**

10 14. Plaintiff visited BBB Sacramento Store on June 30, 2021 and then again on May 19,  
11 2022.

12 15. With respect to the June 30, 2021 encounters with BBB Sacramento Store barriers to  
13 accessibility, Plaintiff filed suit December 8, 2021 under cause number 2:21-cv-  
14 02274-KJM-DB in this district ("Lawsuit").

15 16. The parties settled the Lawsuit.

16 17. During both visits, Plaintiff discovered that the BBB Sacramento Store was not  
17 compliant with the ADA and Unruh. Plaintiff filed suit on December 8, 2021 under  
18 cause number 2:21-cv-02274-KJM-DB in this district ("Lawsuit"). The suit was  
19 settled. This Complaint does not Allege violations at the BBB Sacramento Store

20 18. The parties settled the Lawsuit. This Complaint currently makes no claims against the  
21 BBB Sacramento Store.

22 19. Plaintiff visited BBB Bakersfield on August 9, 2022 and made a purchase there.

23 Plaintiff encountered the following non-exhaustive barriers to accessibility:

24 a. Clear width of accessible routes was less than 36" between displays of  
25 merchandise. This condition makes it more difficult for Plaintiff to shop between  
26 displays of merchandise. This condition violates accessibility standards at  
27 403.5.1.

28 b. The bathroom door required the push-pull force greater than 5 lbs. This condition  
makes it more difficult for Plaintiff to open the door. This condition violates  
accessibility standards at 309.4.2.

1 c. The bathroom door required the twisting of the wrist. This condition makes it  
2 more difficult for Plaintiff to open the door. This condition violates accessibility  
standards at 309.4

3 20. Plaintiff visited the BBB Beaumont Store on May 16, 2022 and made a purchase  
4 there.

5 a. Numerous service counters did not have a 36" long lowered section and were  
6 cluttered with merchandise and equipment<sup>1</sup>. This condition makes Plaintiff's use of  
7 the payment counter more difficult. This condition violates accessibility standards  
at 904.4.1.

8 b. Clear width of accessible routes was less than 36" between displays of merchandise.  
9 This condition makes it more difficult for Plaintiff to shop between displays of  
10 merchandise. This condition violates accessibility standards at 403.5.1.

11 c. There were numerous protruding objects that reduced the clear width of accessible  
12 routes between rows of merchandising displays. This condition makes it more  
difficult for Plaintiff to move between the rows of merchandise. This condition  
13 violates accessibility standards at 307.5.

14 d. The bathroom door required the push-pull force greater than 5 lbs. This condition  
15 makes it more difficult for Plaintiff to open the door. This condition violates  
accessibility standards at 309.4.2.

16 21. These barriers at the BBB Stores interfered with Plaintiff's full and equal enjoyment  
17 of the Stores.

18 22. The barriers at the Stores relate to and impact Plaintiff's disability; Plaintiff  
19 personally encountered these barriers.

20 23. The failure to provide accessible features at the Stores created difficulty and  
21 discomfort for the Plaintiff.

22 24. Defendant has failed to maintain in working and useable conditions those features  
23 required to provide ready access to persons with disabilities.

24 25. The barriers identified above are easily removed without much difficulty or expense.  
25 They are the types of barriers that are readily achievable to remove. Moreover, there  
26 are numerous alternative accommodations that could be made to provide a greater  
27 level of access if complete removal were not achievable.

28 <sup>1</sup> See U.S. Dept. of Justice, *Maintaining Accessible Features in Retail Establishments* Checklist at 15.  
[https://www.ada.gov/business/retail\\_access.htm](https://www.ada.gov/business/retail_access.htm)

1 26. Plaintiff is often in the area where the Stores are located.

2 27. Plaintiff intends to return to the Stores in the winter of 2022/2023 to make purchase  
3 of goods.

4 28. Plaintiff is an ADA tester who frequently travels to the Bakersfield and Beaumont  
5 areas where the Stores are located.

6 29. Plaintiff will return to the Stores to avail himself of their goods and services and to  
7 determine compliance with the disability access laws once it is represented to him  
8 that the Stores are accessible. Plaintiff is currently deterred from doing so because of  
9 his knowledge of the existing barriers and his uncertainty about the existence of yet  
10 other barriers on the site. If the barriers are not removed, Plaintiff will face unlawful  
and discriminatory barriers again.

11 **FIRST CAUSE OF ACTION: VIOLATION OF THE AMERICANS WITH**  
12 **DISABILITIES ACT OF 1990**  
13 (42 U.S.C. section 12101, et seq.)

14 30. Plaintiff re-pleads and incorporates by reference, as if fully set forth again herein, the  
15 allegations contained in all prior paragraphs of this complaint.

16 31. Under the ADA, it is an act of discrimination to fail to ensure that the privileges,  
17 advantages, accommodations, facilities, goods and services of any place of public  
18 accommodation is offered on a full and equal basis by anyone who owns, leases, or  
19 operates a place of public accommodation. See 42 U.S.C. § 12182(a). Discrimination  
is defined, inter alia, as follows:

- 20 a. A failure to make reasonable modifications in policies, practices, or procedures,  
21 when such modifications are necessary to afford goods, services, facilities,  
22 privileges, advantages, or accommodations to individuals with disabilities, unless  
23 the accommodation would work a fundamental alteration of those services and  
24 facilities. 42 U.S.C. § 12182(b)(2)(A)(ii).
- 25 b. A failure to remove architectural barriers where such removal is readily  
26 achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). Barriers are defined by reference to  
27 the ADA Standards.
- 28

1 c. A failure to make alterations in such a manner that, to the maximum extent  
2 feasible, the altered portions of the Hotel are readily accessible to and usable by  
3 individuals with disabilities, including individuals who use wheelchairs or to  
4 ensure that, to the maximum extent feasible, the path of travel to the altered area  
5 and the bathrooms, telephones, and drinking fountains serving the altered area, are  
6 readily accessible to and usable by individuals with disabilities. 42 U.S.C. §  
7 12183(a)(2).

8 32. When a public accommodation provides accessible facilities for persons, it must do  
9 so for all persons, both fully abled and disabled.

10 33. A public accommodation must maintain in operable working condition those features  
11 of its facilities and equipment that are required to be readily accessible to and usable  
12 by persons with disabilities. 28 C.F.R. § 36.211(a).

13 34. Here, the failure to ensure that the accessible facilities were available and ready to be  
14 used by the plaintiff is a violation of the law.

15 **SECOND CAUSE OF ACTION: VIOLATION OF THE UNRUH CIVIL RIGHTS**  
16 **ACT**

17 (Cal. Civ. Code § 51-53.)

18 35. Plaintiff repleads and incorporates by reference, as if fully set forth again herein, the  
19 allegations contained in all prior paragraphs of this complaint. The Unruh Civil  
20 Rights Act ("Unruh Act") guarantees, inter alia, that persons with disabilities are  
21 entitled to full and equal accommodations, advantages, facilities, privileges, or  
22 services in all business establishment of every kind whatsoever within the jurisdiction  
23 of the State of California. Cal. Civ. Code §51(b).

24 36. The Unruh Act provides that a violation of the ADA is a violation of the Unruh Act.  
25 Cal. Civ. Code, § 51(f).

26 37. Defendants' acts and omissions, as herein alleged, have violated the Unruh Act by,  
27 inter alia, denying, or aiding, or inciting the denial of, Plaintiff's rights to full and  
28 equal use of the accommodations, advantages, facilities, privileges, or services  
offered.

1 38. Because the violation of the Unruh Civil Rights Act resulted in difficulty, discomfort  
2 or embarrassment for the plaintiff, the defendants are also each responsible for  
3 statutory damages, i.e., a civil penalty. (Civ. Code § 55.56(a)-(c).)

4 **PRAYER FOR RELIEF**

5 Plaintiff prays that this Court award damages and provide relief as follows:

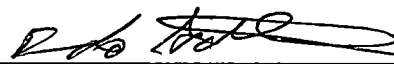
- 6 a. For injunctive relief compelling Defendants to comply with the Americans  
7 with Disabilities Act and the Unruh Civil Rights Act.
- 8 b. For injunctive relief requiring Defendant to adopt written and enforceable  
9 “reasonable modifications in policies, practices, or procedures, when such  
10 modifications are necessary to afford goods, services, facilities, privileges,  
11 advantages, or accommodations to individuals with  
12 disabilities.” assure compliance with 42 U.S.C. §12182(b)(2)(A)(ii) / 28  
C.F.R. §36.302.
- 13 c. Damages under the Unruh Civil Rights Act, which provides for actual  
14 damages and a statutory minimum of \$4,000 for each encounter for the total of  
15 \$8,000.00.
- 16 d. In the event Plaintiff is required to hire counsel, for reasonable attorney fees,  
17 litigation expenses and costs of suit, pursuant to 42 U.S.C. § 12205.

18 **REQUEST FOR JURY TRIAL**

19 Plaintiff requests a trial by a jury.

20 **RESPECTFULLY SUBMITTED (MAILED)** to the District Court on

21 9-7-22

22   
23 Fernando Gastelum